

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FILED

October 3, 2016
Carla Bender
4th District Appellate
Court, IL

2016 IL App (4th) 140204-U
NOS. 4-14-0204, 4-14-0738 cons.
IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DANIEL G. BAHLER,)	No. 03CF419
Defendant-Appellant.)	
)	Honorable
)	Elizabeth A. Robb,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly denied defendant's amended motions for leave to file his second and third successive postconviction petitions because defendant failed to overcome the bar against successive postconviction petitions by satisfying the cause-and-prejudice test. The appellate court also rejected defendant's claim that the circuit clerk improperly imposed a \$50 systems fine.
- ¶ 2 Following a bench trial in October 2003, the trial court found defendant, Daniel G. Bahler, guilty of attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a) (West 2002)) and home invasion (720 ILCS 5/12-11(a)(1) (West 2002)). In February 2004, the court sentenced defendant to 20 years in prison for each conviction, which it ordered to be served consecutively. Defendant appealed, and this court affirmed. In May 2006, defendant filed a petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2006)), which the court dismissed. On appeal, we affirmed the trial court's dismissal. In December 2011, defendant sought leave to file a successive postconviction petition under section 122-1(f) of the Act

(725 ILCS 5/122-1(f) (West 2010)), which the court denied. This court subsequently affirmed the trial court's judgment.

¶ 3 In June 2013 and January 2014, defendant sought leave to file his second and third successive postconviction petitions, respectively, which the trial court denied. Defendant appeals, arguing that (1) the court erred by denying him leave to file his second and third successive postconviction petitions and (2) the circuit clerk improperly imposed a \$50 court systems fine (55 ILCS 5/5-1101(c)(1) (West 2002)). We affirm.

¶ 4 I. BACKGROUND

¶ 5 Because this court previously set forth the evidence adduced at defendant's trial in *People v. Bahler*, No. 4-04-0119 (Nov. 2, 2005) (unpublished order under Supreme Court Rule 23), we restate only those portions that are pertinent to the issues raised in this appeal.

¶ 6 In May 2006, after this court affirmed defendant's conviction and sentence on direct appeal, defendant filed a postconviction petition under the Act. The trial court granted the State's motion to dismiss defendant's postconviction petition, and this court affirmed. *People v. Bahler*, No. 4-06-0993 (Dec. 21, 2007) (unpublished order under Supreme Court Rule 23).

¶ 7 In December 2011, defendant filed a motion for leave to file a successive postconviction petition, which the trial court denied. Defendant appealed, and this court affirmed the trial court's judgment. *People v. Bahler*, No. 4-12-0510 (Aug. 28, 2013) (unpublished order under Supreme Court Rule 23).

¶ 8 In June 2013, defendant filed a motion for leave to file a second successive postconviction petition. Appended to that filing was defendant's second postconviction petition, in which he alleged that (1) the trial court failed to order a fitness hearing before defendant waived his right to a jury trial, (2) his trial counsel failed to investigate his psychiatric history

and failed to request a fitness hearing, and (3) the court convicted him of a crime not charged in the State's indictment. In December 2013, the court denied defendant leave to file a second successive petition, finding that he failed to establish the requisite cause and prejudice for his claims.

¶ 9 In January 2014, defendant filed a motion (1) to reconsider his motion for leave to file a second successive petition and (2) for leave to file a third successive postconviction petition, characterizing the latter as an amended successive postconviction petition. In March 2014, the trial court denied defendant's motion to reconsider his second successive petition. In May 2014, this court granted defendant leave to file a late notice of appeal of the trial court's December 2013 order denying defendant leave to file a second successive postconviction petition, which this court docketed as case No. 4-14-0204.

¶ 10 Defendant's January 2014 motion for leave to file a third successive petition reiterated the three claims he raised in his second successive petition. Specifically, defendant stated that although he was seen by a psychiatrist prior to waiving his right to a jury trial, his pretrial examination was not for the purpose of determining fitness. Defendant also added a new claim, alleging that trial counsel was ineffective for failing to communicate the State's 20-year plea offer during trial. In July 2014, the trial court denied defendant's motion for leave to file his third successive petition, finding defendant's claims were barred by *res judicata* and failed the cause-and-prejudice test. In August 2014, defendant filed a notice of appeal of the trial court's July 2014 denial, which this court docketed as case No. 4-14-0738.

¶ 11 Defendant appeals the trial court's December 2013 and July 2014 orders denying his motions for leave to file his second and third successive postconviction petitions, as well as the circuit clerk's February 2004 assessment of a \$50 court systems fine. We have consolidated

these issues on appeal.

¶ 12

II. ANALYSIS

¶ 13 On appeal, defendant raises three claims. Defendant's first two arguments challenge the trial court's denials of his June 2013 and January 2014 motions for leave to file his second and third successive postconviction petitions. Defendant claims that the court should have granted his motions for leave to file his second and third successive postconviction petitions because he adequately alleged cause and prejudice by outlining the circumstances surrounding his trial counsel's ineffectiveness. Specifically, defendant contends that the court should have granted him leave to file his (1) second successive petition because counsel failed to have his fitness evaluated before trial and (2) third successive postconviction petition because his trial counsel failed to inform him of the prosecution's 20-year plea offer. Defendant also argues that in February 2004, the circuit clerk improperly imposed a \$50 court systems fine, which should be vacated as void. We address defendant's claims in turn.

¶ 14

A. Successive Postconviction Petitions Under the Act

¶ 15 A trial court's determination concerning whether to grant a defendant leave to file a successive postconviction petition is controlled by section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)). *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 38, 38 N.E.3d 1256. We review *de novo* a trial court's denial of a defendant's section 122-1(f) motion for leave to file a successive postconviction petition. *People v. Gillespie*, 407 Ill. App. 3d 113, 124, 941 N.E.2d 441, 452 (2010).

¶ 16

The Act (725 ILCS 5/122-1 to 122-7 (West 2012)) grants criminal defendants a means by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012

IL 112020, ¶ 14, 963 N.E.2d 909. Relief under the Act is available only for constitutional deprivations that occurred at the defendant's original trial. *Id.* The Act generally limits a defendant to one postconviction petition. *Id.* ¶ 15. Issues decided on direct appeal or in the original postconviction petition are barred from successive petitions by the doctrine of *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005). All issues that could have been raised in the original proceeding or original postconviction petition are forfeited. *Id.* at 443-44, 831 N.E.2d at 615. Where *res judicata* or forfeiture preclude a petitioner from obtaining relief, his claim will necessarily be frivolous and without merit. *Id.* at 445, 831 N.E.2d at 615. "As a consequence, a defendant faces a daunting procedural hurdle when bringing a successive postconviction petition." *People v. Jones*, 191 Ill. 2d 194, 198, 730 N.E.2d 26, 29 (2000).

¶ 17 However, there are "two bases upon which the bar against successive proceedings will be relaxed." *People v. Edwards*, 2012 IL 111711, ¶ 22, 969 N.E.2d 829. "The first basis for relaxing the bar is when a petitioner can establish 'cause and prejudice' for the failure to raise the claim earlier." *Id.* Under the cause-and-prejudice test, claims in a successive postconviction petition are barred unless the defendant can establish (1) "good cause for failing to raise his claims in prior proceedings" and (2) "actual prejudice resulting from the claimed errors." *Jones*, 191 Ill. 2d at 199, 730 N.E.2d at 29. "Cause" can be "any objective factor, external to the defense, which impeded the [defendant's] ability to raise a specific claim in the initial post-conviction proceeding." *People v. Pitsonbarger*, 205 Ill. 2d 444, 462, 793 N.E.2d 609, 622 (2002). "Prejudice" results when "an error *** so infected the entire trial that the resulting conviction violates due process." (Internal quotation marks omitted.) *People v. Britt-El*, 206 Ill. 2d 331, 339, 794 N.E.2d 204, 209 (2002) (quoting *Jones*, 191 Ill. 2d at 199, 730 N.E.2d at 29). Like the test for ineffective assistance of counsel, the cause-and-prejudice test is composed of two elements, both of

which must be met for the defendant to prevail. *Pitsonbarger*, 205 Ill. 2d at 464, 793 N.E.2d at 624. Thus, if the defendant's claims have no merit, no prejudice resulted, and the test is not met.

¶ 18 "The second basis by which the bar to successive postconviction proceedings may be relaxed is what is known as the 'fundamental miscarriage of justice' exception." *Edwards*, 2012 IL 111711, ¶ 23, 969 N.E.2d 829. To demonstrate a "fundamental miscarriage of justice," the defendant must show actual innocence. *Id.*

¶ 19 B. Trial Counsel's Failure To Solicit Evaluation of Fitness

¶ 20 Defendant alleges that he showed cause and prejudice to file a second successive postconviction petition by arguing that his trial counsel was ineffective for failing to have him examined to determine whether there was a *bona fide* doubt of his fitness before he waived his right to a jury. The State responds that the trial court properly denied defendant's motion for leave to file a second successive postconviction petition because his claim was barred by *res judicata*. We agree with the State.

¶ 21 The trial court ruled the claim raised in defendant's second successive petition was barred by *res judicata*, explaining that defendant argued in his original postconviction petition that his trial counsel was ineffective for failing to investigate his fitness to stand trial and failing to ask the court for a fitness hearing. This court affirmed the trial court's denial of his original postconviction petition on appeal.

¶ 22 Defendant argues that the ineffective assistance of counsel argument in his initial postconviction petition is distinguishable from the claim he raises in his second successive petition. According to defendant, he argued in his initial petition that trial counsel failed to adequately investigate his psychiatric history. He distinguishes that argument from the argument he asserts now, which is that trial counsel was ineffective for relying on the wrong information to

determine that there was no *bona fide* doubt he was unfit, *i.e.*, the examination was not conducted with the explicit purpose of determining defendant's fitness.

¶ 23 Even if we agreed with defendant's differentiation between his arguments in his original petition and those made here, which we do not, he fails to show the requisite cause because the claim has been forfeited. His argument that trial counsel was ineffective for relying on the "wrong" psychological examination could have been argued in his initial postconviction petition, in which he made nearly identical arguments for ineffective assistance of counsel on similar bases.

¶ 24 Accordingly, we find that defendant's claim of ineffective assistance of counsel for relying on a purportedly inadequate psychological examination is forfeited. See *Blair*, 215 Ill. 2d at 444-45, 831 N.E.2d at 615-16. Defendant is therefore unable to establish the requisite cause to file a successive postconviction petition. See *id.*

¶ 25 C. Trial Counsel's Failure To Disclose Plea Offer

¶ 26 Defendant alleges he showed cause and prejudice to file a third successive postconviction petition by arguing that his trial counsel was ineffective for failing to inform him of a 20-year guilty-plea offer during trial. In response, the State argues that the trial court properly denied defendant's motion for leave to file a third successive postconviction petition because it was barred by the doctrine of *res judicata*. We agree with the State.

¶ 27 Postconviction petitions are subject to the limitations of *res judicata*. *Id.* at 445, 831 N.E.2d at 615. If an issue is reargued without presenting any newly discovered evidence, *res judicata* will bar its review. *Cf. id.* at 443, 831 N.E.2d at 615 (*res judicata* and forfeiture bar claims based on information that a party could have raised in an earlier proceeding, but failed to do so).

¶ 28 In this case, defendant fails to show the requisite cause because the claim—ineffective assistance of counsel for failure to inform him of the State's 20-year offer—is barred by *res judicata*. Defendant contends that his claim is new evidence of which he was unaware at the time of his first postconviction petition. However, the record shows the 20-year guilty-plea offer was raised and discussed during proceedings on his initial postconviction petition. Defendant failed to raise any arguments regarding the 20-year plea deal at that time, but he argued a nearly identical claim based on a purported 8-year guilty plea offer. Defendant's argument is thus barred by *res judicata*.

¶ 29 Even if the defendant's current argument is distinct from his prior argument, it is still without merit. Under the "cause and prejudice" test, cause may be established by showing that a " 'factual or legal basis for a claim was not reasonably available to counsel' " at the time of the initial postconviction petition. *Pitsonbarger*, 205 Ill. 2d at 460, 793 N.E.2d at 622 (quoting *Strickler v. Greene*, 527 U.S. 263, 283 n.24 (1999)). Absent this showing, forfeiture bars any claim that could have been raised in a prior postconviction petition. *Blair*, 215 Ill. 2d at 445, 831 N.E.2d at 615-16.

¶ 30 At the time of his first postconviction petition, defendant had all the information necessary to argue the ineffective assistance of counsel for failing to communicate a 20-year guilty-plea offer. Accordingly, defendant's argument does not satisfy the "cause" prong of the cause-and-prejudice test and is forfeited.

¶ 31 D. Court Systems Fine

¶ 32 Defendant argues that the circuit clerk, in February 2004, improperly imposed a \$50 court systems fine (55 ILCS 5/5-1101(c)(1) (West 2002)). The State responds that the record suggests the trial court imposed the fine at issue, not the circuit clerk, and the fine is there-

fore proper. We agree with the State.

¶ 33 The determination of whether the circuit clerk imposed a fine against a defendant is an issue of statutory construction and is reviewed *de novo*. *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 99, 55 N.E.3d 117 (citing *People v. Gutman*, 2011 IL 110338, ¶ 12, 959 N.E.2d 621). Fines and fees are two distinct charges. A fee is a charge designed to recoup the State's expenses, while a fine " 'is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense.' " *Id.* ¶ 93 (quoting *People v. Graves*, 235 Ill. 2d 244, 250, 919 N.E.2d 906, 909 (2009)). The circuit clerk can levy fees on a defendant, but only the trial court can impose fines. *People v. Smith*, 2014 IL App (4th) 121118, ¶ 18, 18 N.E.3d 912.

¶ 34 Defendant notes that the trial court's sentencing order mandated that defendant "pay a fine of \$368.70" and makes no specific mention of a \$50 court systems fine. The court systems fee is only mentioned in the clerk's notice to defendant, where it is itemized in a list among other assessments. However, the notice to defendant also lists the total amount owed by defendant as \$368.70, which is the same amount the court imposed in its sentencing order. Accordingly, we find the court systems fine was imposed by the trial court and was, therefore, proper.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal pursuant to 55 ILCS 5/4-2002 (West 2014).

¶ 37 Affirmed.